**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| In re: Complaints by Southeastern Utilities Services, Inc., on behalf of various customers against Florida Power and Light Company concerning thermal demand meter error. | ) ) ) ) | Docket No.: 030623<br>Filed: August 30, 2004 |
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**CUSTOMERS' RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION FOR PARTIAL SUMMARY FINAL ORDER OR, ALTERNATIVELY, CUSTOMERS' CROSS MOTION FOR PARTIAL SUMMARY FINAL ORDER REGARDING HOW INTEREST SHOULD BE CALCULATED ON REFUNDS DUE**

Petitioners/Customers, Ocean Properties, Ltd., J.C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc. (collectively referred to as "Customers") file their Response to Florida Power & Light Company's ("FPL") Motion for Partial Summary Final Order Seeking Denial of FPL's Motion. Alternatively, with respect to how the interest rate should be determined on refund monies, Customers file this Cross Motion for Partial Summary Final Order pursuant to Rule 28-106.204(4), Florida Administrative Code.

FPL seeks the entry of partial summary final order regarding two issues:

1) **Should the Customers in this docket be limited to a 12-month refund because it cannot be shown that the error was due to some cause, the date of which can be fixed?**

2) **How should the interest amount be calculated on refunds that are due?**

Summary final order should not be granted in favor of FPL on either issue. The period of time for which refunds should be provided is a disputed issue of fact about which conflicting testimony has been filed. Additionally, discovery is outstanding on this issue and related issues, making entry of final summary order inappropriate. Thus, the trier of fact will need to hear evidence and render a decision on this disputed issue of material fact. The interest calculation is the subject matter of a pending rule challenge, which the parties agreed could be re-activated within 15 days after the entry of the Commission's Final Order in the case. Determining this

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issue by Partial Final Order may interfere with the parties' previous agreement that the rule challenge could be commenced after the entry of the Commission's Final Order. Accordingly, a ruling on the interest rate to be applied should be deferred until: 1) the sum of money due Customers is fixed; and 2) the entry of the Commission's Final Order in the case. Alternatively, should a final summary order be entered, it should be entered in favor of Customers rather than FPL for the reasons set forth herein.

**I. Should Customers receive refunds for a period of time longer than 12 months?**

Rule 25-6.103(1) requires a utility to refund monies to customers for meters that exceed an acceptable degree of tolerance. However, after arbitrarily imposing a 12-month limitation on refunds, without explanation, the rule provides that "if it can be shown that the error was due to some cause, the date of which can be fixed, the over charges shall be computed back to but not beyond such date based upon available records." Customers contend that the meters in dispute were over-registering from the date of installation at the Customers' business. Thus, the date for which the meter error should be calculated is established. Evidence also is offered to show the cause of the over-registration. FPL did not calibrate and test the meters in question in accordance with the manufacturer guidelines, suggesting that the meters were likely miscalibrated or otherwise mishandled when originally installed. (See George Brown Direct Testimony at page 4, lines 18-25, pages 8-9, lines 5-12; Bill Smith Direct Testimony at page 8, line 23 to page 13, line 23). Not surprisingly, FPL argues the meters gradually went bad over time, thus the date of over-registration cannot be determined and the refund should be limited to 12 months. However, testimony from a former Landis and Gyr engineer, the meter manufacturer, and FPL meter technicians indicate that they know of nothing that could gradually cause a thermal demand meter like the ones in question to gradually go bad over time. (See

George Brown Direct Testimony at page 6, line 23 to page 7, line 5). See also, Affidavit of George Brown, attached hereto as Exhibit A. Thus, conflicting evidence exists regarding the point in time the meters began over-registering, making summary final order inappropriate. Factual issues may not be tried or resolved by summary judgment and summary judgment should not be rendered unless the facts are so crystallized that nothing remains but questions of law. Shaffran v. Holness, 93 So.2d 94 (Fla. 1957), Florida Power & Light Co. v. Daniell, 591 So.2d 284, 16 Fla. L. Week. D3006 (Fla.App. 5 Dist., Dec 05, 1991). Additionally, evidence in the record suggests that the sun or thermal heat can have an affect on thermal demand meters, placing another fact in dispute about which conflicting evidence exists.[1]

Moreover, evidence is still being gathered in the case and key discovery is still outstanding, making it inappropriate for the entry of final summary order. The Customers have scheduled for September 13, 2004, the deposition of meter manufacturer's corporate representative most knowledgeable about the meters in dispute. Such a witness will likely hold probative and relevant information concerning a key issue in dispute, i.e., whether the meters gradually go bad over time or were the meters over-registering from the initial date of installation. (For example, if the meter manufacturer has never heard numerous complaints about its meter gradually over-registering demand, Customers' theory of the case is strengthened.) However, Customers should at least be afforded the opportunity to seek such information. Further, on August 23, 2004, discovery in the form of Interrogatories and Request for Production was served on FPL. (Ocean Properties 4th Request for Production of Documents and Ocean Properties 2nd Set of Interrogatories.) Responses to this discovery are pending.

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[1] See George Brown Direct Testimony at page 9, line 18 to page 10, line 15; Bill Smith Direct Testimony at page 14, lines 4-22.

FPL contends that the dates the meters began over-registering were not established by Customers. The testimony of Customers' witness George Brown sets forth dates that should be used for the purposes of refund calculation. (See George Brown Direct Testimony at page 7, line 9 to page 8, line 4). Additionally, FPL has not provided Customers access to another key piece of evidence, the meters themselves. Customers have a pending motion to require FPL to provide access and testing of the meters in dispute, so that additional evidence regarding the cause and date of meter over-registration is likely to be forthcoming once access to the meters is realized. (Additionally, upon information and belief, the meters have stickers or stamps on them that are evidence of test and/or calibration dates.) This type of evidence, in addition to examination of FPL witnesses (FPL witnesses Morley and Malemezian are to be deposed on September 8, 2004) and adverse witnesses who worked in FPL meter testing shop and can authenticate FPL meter test records, provides the trier of fact a disputed issue of fact that needs to be determined at hearing, not by summary final order.

It is not appropriate to decide the issue of the period of time for which meter refunds should be awarded before the first witness has been sworn, discovery by deposition of the corporate representative most knowledgeable person with the meter manufacturer awaits, two key FPL witnesses have not yet been deposed, request for production and interrogatories are outstanding and discovery review of a critical piece of evidence, the meters themselves, has been denied by FPL and is the subject of a pending motion to compel. See Fleet Finance & Mortgage, Inc. v. Carey, 707 So.2d. 949 (Fla. 4th DCA 1998) (court should not enter summary judgment {which is akin to a summary final order} when opposing party has not completed discovery); Villages at Mango Key Homeowners Association, Inc. v. Hunter Development, Inc., 699 So.2d 337 (Fla. 5th DCA 1997) (summary judgment is inappropriate and premature when discovery is

ongoing and depositions or other discovery are outstanding); Brandauer v. Publix Super Markets, Inc., 657 So.2d 932 (Fla. 2nd DCA 1995) (as a general rule, a court should not enter summary judgment when the opposing party has not completed discovery). For the reasons set forth above, FPL's Motion for Partial Summary Final Order related to period of time for which refunds should be issued should be denied.

## II. How should the interest amount be calculated on refunds that are due?

Interest on refunds should be calculated in accordance with Section 687.01, Florida Statutes (2003), not Rule 25-6.109 for which no statutory authority exists, a rule that is the subject of a pending rule challenge petition.

FPL seeks partial summary order regarding how interest of refunds should be calculated. For the following reasons, customers argue the better way to address this issue is not through final summary order, but by means of Final Order after hearing. The interest sums cannot be determined until the refund amounts have been liquidated or otherwise ascertained with certainty. Additionally, the rule which FPL asks the Commission to rely, 25-6.109(4), is the subject of a rule challenge pending at the Division of Administrative Hearings. Customer Ocean Properties argues that this Commission lacks express statutory authority to adopt a rule setting an interest rate and that a State statute already addresses the issue. (See Copy of Rule Challenge Petition, a copy of which is attached hereto as Exhibit B.) The parties have agreed to abate the rule challenge pending the issuance of a final order on this issue, at which point the rule challenge can be litigated, with the PSC considering the results of the rule challenge. (See Exhibit C.)

Finally, FPL seeks to dodge the import of the Florida Supreme Court's opinion in Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988). The question

before the Court, certified as one of great public importance, was whether a regulated public utility in Florida is liable to Customers for prejudgment interest on overcharge refunds. The Supreme Court answered this question in the affirmative, and stated that, in the absence of a controlling contractual provision, the rate is set by the Legislature as directed in Section 687.01[2], Florida Statutes (2003). FPL is a regulated public utility, and thus, it ought to be bound by this controlling precedent.

FPL argues that the PSC interest rate rule, and a PSC decision handed down after the Supreme Court's opinion in Kissimmee Utility, controls over the authority of the Florida Supreme Court's opinion in Kissimmee Utility, and over the Legislature's express direction about what interest rate should be applied in the absence of controlling contractual provision. FPL's argument comes up short. As spelled out in the pending rule challenge petition, the Legislature has not provided the PSC with express authority to enact a rule regulating interest rates that overrides Section 687.01, Florida Statutes (2003). Additionally, the Legislature, had it wished for agency rules on interest rates to prevail over Section 687.01, Florida Statues, surely could have specified that the statutory rate applies unless a contractual provision **or agency rule** provides otherwise. While the Legislature deferred to parties' ability to contract for an interest rate, it did not similarly defer to an agencies' desire to enact an interest rate rule different from what is statutorily required.

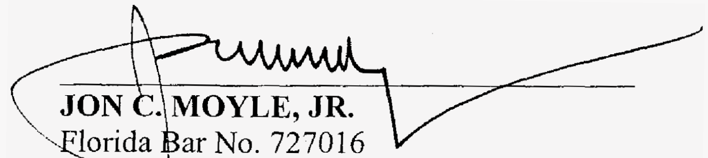
Finally, FPL relies on a previous order entered in the matter of In re: Complaint by Kelly Tractor Company, Inc. against Meadow Brook Utility Systems, Inc., regarding refund for overpayments in Palm Beach County, Order No. 20474 issued December 20, 1988. This opinion, which did not involve an electric utility or electric utility rules, apparently opted not to

[2] Section 687.01, Florida Statues, entitled Rate of Interest in absence of contract, states: "In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03." The Chief Financial Officer establishes the rate on an annual basis as set forth in Section 55.03, Florida Statutes.

follow the direction of the Florida Supreme Court, given "the superficial strength of the Florida Supreme Court's affirmative answer to the question that was certified to it." 88 F.P.S.C. 12:275 at 277. The strength of the Florida Supreme Court's finding in Kissimmee Utility is beyond "superficial", and ought to be followed.

Wherefore, for the foregoing reasons, Customers respectfully request that FPL's Motion for Partial Summary Final Order be denied in all respects, or alternatively, that Customers' Cross Motion for Partial Summary Final Order Regarding How Interest Should Be Calculated on Refunds Due be granted, and interest be calculated in accordance with Section 687.01, Florida Statutes (2003).

DATED this 30th day of August, 2004.



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Attorneys for Customers

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 30th day of August, 2004.

Cochran Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Bill Walker
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, FL 32301

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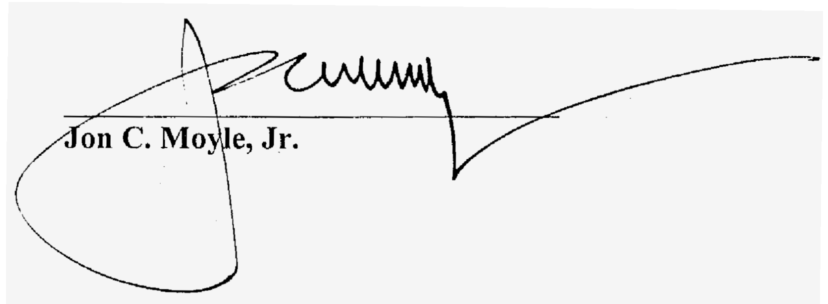

**AFFIDAVIT**

STATE OF FLORIDA
COUNTY OF MANATEE

BEFORE ME, this day personally appeared George Brown, who being duly sworn, deposes and says that the following information is true and correct, and within his personal knowledge:

1. My name is George Brown. I am 59 years of age and am of sound mind and am competent to testify to the matters set forth herein. I give the following information of which I have personal knowledge, both freely and truthfully and without any threat of coercion or promise of reward.

2. I have reviewed Florida Power and Light Company's Motion of Partial Summary Final Order filed August 23, 2004.

3. I have reviewed the testimony I have caused to be filed in this matter as it relates to the period of time for which refunds should be provided to Customers and the reasons therefore. I believe Customers have set forth, and will provide at hearing, evidence establishing that refunds should extend beyond a 12 month time frame.

4. My testimony is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.

GEORGE BROWN

STATE OF FLORIDA
COUNTY OF MANATEE

Sworn to and subscribed before me by George Brown this 30th day of August, 2004.

_____ he/she is personally known to me, **OR**
_✓_ has produced _FL DL_ as identification.

NOTARY PUBLIC

(NOTARY STAMP)

Print Name

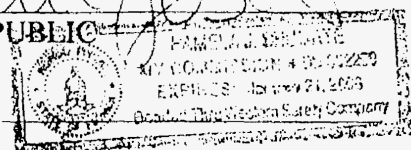

EXHIBIT A

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Ocean Properties, Ltd.,
Petitioner,

vs.

Florida Public Service Commission,
Respondent,
/

## PETITION FOR ADMINISTRATIVE DETERMINATION OF INVALIDITY OF EXISTING RULE PURSUANT TO SECTION 120.56(3), FLORIDA STATUTES

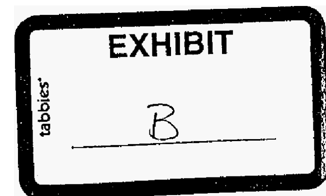
Petitioner, Ocean Properties, Ltd., through its undersigned counsel, files this Petition for Administrative Determination of Invalidity of Rule pursuant to Section 120.56(3), Florida Statutes ("F.S."), for a determination of the invalidity of existing Rule 25-6.109(4)(a), Florida Administrative Code ("F.A.C."). In support, Petitioner states the following:

1. Petitioner in this proceeding is Ocean Properties, Ltd., 1001 East Atlantic Avenue, Suite 202, Delray Beach, Florida 33483. Petitioner is represented in this matter by Jon C. Moyle, Jr., Moyle, Flanigan, Katz, Raymond & Sheehan, P.A., 118 North Gadsden Street, Tallahassee, FL 32301, telephone: 850-681-3828.

2. Respondent, Florida Public Service Commission ("PSC") is an agency of the State of Florida, created pursuant to Chapter 350, F.S., and located at 2540 Shumard Oak Boulevard, Tallahassee, FL 32399.







## Background Information

3. Petitioner is a commercial retail electric service customer of Florida Power & Light Company ("FPL"), an investor-owned utility regulated by the PSC.

4. Petitioner's retail electric service demand is measured by Type 1V thermal demand meter that is owned and installed by FPL. FPL's meters have inaccurately over-registered Petitioner's electric service demand, and as a result, Petitioner has been overcharged by, and has overpaid, FPL for retail electric service. Petitioner, as one of a group of FPL retail electric utility service customers who have been overcharged for electric service demand as a result of FPL's inaccurate Type 1V thermal demand meters. These customers, including Ocean Properties, Ltd., have filed a Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes with the PSC, requesting the PSC to order FPL to refund the overcharges paid by Petitioner and the other customers. That proceeding currently is pending before the PSC.

5. Rule 25-6.109, F.A.C (also known as the "Rule"), is entitled "Refunds." By its terms, the Rule governs, which certain exceptions not relevant here, refunds (including the type of overcharges referenced in Paragraph 4 above), ordered by the PSC. Fla. Admin. Code R. §25-6.109(1). Pursuant to Proposed Agency Action ("PAA") Order No. PSC-03-1320-PAA-EI, issued by the PSC on November 21, 2003, the PSC stated it will apply Rule 25-6.109(4), F.A.C., to determine the amount of interest to be paid by FPL to Petitioner. (This order is being challenged as part of the Petition for Fomal Administrative Hearing referenced in Paragraph 4 above. A copy of this Order is attached as Exhibit A.)

6. Rule 25-6.109(4), F.A.C., states the interest rate that the PSC will apply to determine how much interest is due on refunds from electric utility services and provides in pertinent part:

(4) Interest.

(a) In the case of refunds which the Commission orders to be made with interest, **the average monthly interest rate until the refund is posted to the customer's account shall be based on the thirty (30) day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of $ 1,000 as regularly published in the Wall Street Journal.**

Fla. Admin. Code R. 25-6.109(4)(a)(emphasis added).

8. Subsubsections (b) through (d) of Rule 25-6.109(4), F.A.C., establish the method for calculating the specific amount of interest due on refunds of overcharges based on the interest rate adopted in subsubsection (a).

9. Section 350.127(2), F.S., is cited as the specific statutory authority for Rule 25-6.109(4), and Sections 366.03, 366.04(2)(f), 366.06(3), 366.071, and 366.071(2), F.S. (attached as Composite Exhibit B), are cited as the statutes implemented by the Rule. However, a review of these statutes reveals that none provide specific statutory authority, as required by Sections 120.52(8), F.S., and 120.536(1), F.S., for the PSC to establish an interest rate, or to "pick and choose" which interest rate – including that adopted in Rule 25-6.109(4)(a), F.A.C., – it will apply to determine the amount of interest due on electric utility service overcharges.[1] Nor do any other statutes confer this required specific authority on the PSC.

10. Because the PSC lacks the statutory authority necessary to establish by rule an interest rate or to choose which interest rate it will apply to overcharge refunds, the general statutory interest rate established pursuant to Section 687.01, F.S., applies to refunds for electric utility service

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[1] At most, the statutes can be read to provide authority to the PSC for interest rates involved in rate refunds where rates have gone into effect prior to a Commission order [Section 366.06 (3), F.S.], or interim rates are involved [Section 366.071(2)(a), F.S.]. Other than these limited circumstances, the statutes cited do not provide specific statute authority to the PSC to establish interest rates.

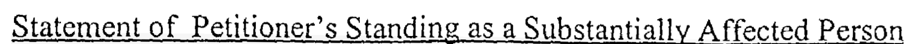
overcharges. This statutory provision, which is entitled "Rate of interest in absence of contract," establishes the interest rate applicable in commercial relationships where, as here, there is no contract between Petitioner and FPL that establishes an interest rate applicable to overcharge refunds.

11. Section 687.01, F.S., states: "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate specified in s. 55.03." Section 55.03, F.S., in turn, provides:

> (1) On December 1 of each year, the Chief Financial Officer shall set the rate of interest that shall be payable on judgments or decrees for the year beginning January 1 **by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate**. . . . The interest rate established by the Chief Financial Officer shall take effect on January 1 of each following year. Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Chief Financial Officer for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation. (emphasis supplied)

12. These statutes (attached as Composite Exhibit C) collectively provide that the applicable interest rate on judgments and decrees is based on the average federal discount rate plus for the preceding year, plus 500 basis points. This interest rate is greater than that codified in Rule 25-6.109(4)(a), F.A.C.

13. The Florida Supreme Court, in *Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So. 2d 46 (Fla. 1988) (copy attached as Exhibit D) indicated that Section 687.01, F.S., applies to determine the interest rate due to retail electric customers on refunds of overcharges.


Statement of Petitioner's Standing as a Substantially Affected Person

14. To have standing to challenge the validity of Rule 25-6.109(4), F.A.C., Petitioner must show it is substantially affected by the rule, See, Section 120.56(1)(b), F.S.; *Greynolds Park Manor, Inc. v Department of Health and Rehabilitative Svcs.*, 491 So. 2d 1157 (Fla. 1st DCA 1986). To do so, Petitioner must allege and demonstrate that it will suffer an injury-in-fact of sufficient immediacy entitling it to a hearing, and that the alleged injury is the type against which this proceeding is designed to protect. *Lanoue v. Florida Department of Law Enforcement*, 751 So. 2d 94, 96-97 (Fla. 1st DCA 1999).

15. Applying Rule 25-6.109(4)(a), F.A.C., to determine the interest paid to Petitioner on the refund of the overcharge, as provided in the PSC's Proposed Agency Action, will result in Petitioner being paid a substantially smaller amount of interest than that to which Petitioner is legally entitled. Thus, as a result of Rule 25-6.109(4), F.A.C., Petitioner will suffer a direct, immediate injury-in-fact.

16. Petitioner's alleged injury falls within the zone of interest this proceeding is designed to protect. Petitioner is a retail electric service customer of FPL, pursuant to Chapters 350 and 366, F.S., and based on the PSC's Proposed Agency Action, will receive interest on the refund of overpayment to FPL under the Rule. If Rule 25-6.109, F.S., is invalidated, it will not be applied to Petitioner. This proceeding will challenge the PSC's proposed application of the Rule to Petitioner in a manner that will result in its being directly and immediately injured. This proceeding is designed to protect against the very type of injury Petitioner alleges in this case. Accordingly, Petitioner's alleged injury fall within the zone of interest of this proceeding, and it has standing to challenge the Rule.

Basis for Determining the Invalidity of the Rule

17. The Rule is an invalid exercise of delegated legislative authority for the following reasons:

A. The PSC has exceeded its grant of rulemaking authority, citation to which is required by Section120.54(3)(a)(1), F.S.

B. The Rule enlarges, modifies or contravenes the specific provisions of law implemented, citation to which is required by §120.54(3)(a)(1), F.S. The Rule purports to implement several statutory provisions, none of which provide the PSC with authority to adopt interest rates on refunds for overcharges, thus supplanting the legislative provision in Section 687.01, F.S. which sets forth the interest rate to be applied.

Disputed Issues of Material Fact or Law

18. Petitioner believes that there are no disputed issues of material fact.

19. The disputed issues of material law include the following:

A. Whether the PSC has exceeded its grant of rulemaking authority, citation to which is required by Section 120.54(3)(a)(1), F.S., thus violating Section 120.52(8) and Section120.536(1), F.S.

B. Whether the Rule enlarges, modifies or contravenes the specific provisions of law implemented, citation to which is required by Section120.54(3)(a)(1), F.S.

Relief Requested

20. For the reasons set forth herein, Petitioner respectfully requests:

A. The Director the Division of Administrative Hearings find that this Petition complies with the requirements of §120.56(1)(b), F.S. and assign it to an Administrative Law Judge

to conduct a final hearing within thirty (30) days of said assignment.

B. The Administrative Law Judge determine that the Rule constitutes an invalid exercise of delegated legislative authority and that the Rule is thus invalid.

C. The Administrative Law Judge award Petitioner reasonable costs and attorney's fees.

D. Petitioner be granted such other relief as may be deemed appropriate.

Respectfully submitted this 25th day of June, 2004.

Jon C. Moyle, Jr.
Fla. Bar No. 0727016
Moyle Flanigan Katz Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
Telephone: 850-681-3828
Telefax: 850-681-8788

Attorney for Petitioner

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Petition for Administrative Determination of Invalidity of Existing Rule Pursuant to Section 120.56(3), Florida Statutes was served by hand delivery to the Division of Administrative Hearings, 1230 Apalachee Parkway, DeSoto Building, Tallahassee, Florida 32399-1550 and that a true copy has been hand delivered to W. Cochran Keating, Esq., Office of the General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399; all on this 25th day of June, 2004.

Jon C. Moyle, Jr.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| In re: Complaints by Southeastern Utility Services, Inc., on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error. | DOCKET NO. 030623-EI<br>ORDER NO. PSC-03-1320-PAA-EI<br>ISSUED: November 19, 2003 |
|---|---|

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER RESOLVING COMPLAINTS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

In January, 2002, we received a customer inquiry from Southeastern Utility Services, Inc. (SUSI), on behalf of a Florida Power & Light Company (FPL) customer. The complaint concerned one of FPL's Type 1V thermal demand meters used in commercial applications. SUSI alleged that the meter improperly measured, or registered, demand when it was exposed to sunlight followed by shade. At the request of SUSI, a Commission staff engineer witnessed a test of the meter under simulated field conditions. The test revealed that the meter could become inaccurate when subjected to changes in temperature that would be caused by

exposure to sunlight in the morning followed by shade in the afternoon.

In September, 2002, to determine whether the phenomenon was unique to this particular meter, FPL tested a sample of 50 Type 1V thermal demand meters and a sample of 100 additional thermal demand meters of various types under the same simulated field conditions. None of the 150 additional meters responded similarly to the original meter, but the test results showed that more than the allowable percentage of Type 1V meters registered demand outside of the tolerance limits specified in Commission Rule 25-6.056, Florida Administrative Code.

On October 11, 2002, FPL notified staff of its plans to remove and replace all of its approximately 3,900 Type 1V thermal demand meters by January, 2003. FPL indicated that it would test each meter and issue refunds to customers whose meters over-registered demand, but it would not backbill customers whose meters under-registered demand absent evidence of meter tampering or fraud. The results of the individual meter tests conducted by the utility indicated that 15% of the meters registered outside of tolerance, with 11% under-registering demand and 4% over-registering demand. Thus, many more customers were under-billed rather than over-billed as a result of Type 1V meter errors. Recently, FPL retested at a higher demand level, or higher percentage of scale, each meter that over-registered demand at any level in testing and was not already tested at the higher percentage of scale. The results of the additional tests indicated that 6% of the meters over-registered demand outside of tolerance.

SUSI has submitted complaints on behalf of several customers whose Type 1V meters (now removed and replaced by electronic demand meters) were found to over-register demand during FPL's tests. On January 24, 2003, SUSI submitted a complaint on behalf of one Target account. On March 6, 2003, SUSI submitted complaints on behalf of thirteen additional Target accounts. On July 16, 2003, SUSI submitted complaints on behalf of two Dillards accounts and two JCPenny accounts. On July 17, SUSI submitted complaints on behalf of three Best Buy accounts. On July 29, 2003, SUSI submitted a complaint on behalf of one Ocean Properties account. Since that time, SUSI has submitted complaints on behalf of six Home Depot accounts. In each complaint, except the January 24 Target complaint, there is no dispute that the customer's meter

over-registered demand. Each complaint involves the appropriate amount of refund to be provided to those customers.

SUSI and FPL attempted to settle the complaints submitted by SUSI without the need for Commission intervention. The parties made progress in narrowing the issues in dispute, but could not reach agreement over the appropriate amount of refunds. In June, 2003, the parties informed us that they had reached an impasse concerning the complaints filed up to that time. Thereafter, on July 16, 2003, we opened Docket No. 030623-EI to address issues regarding the remaining dispute, which is the appropriate method to determine refunds for those customers who used Type 1V thermal demand meters that over-registered demand.

We have jurisdiction over this matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04 and 366.05, Florida Statutes. After considerable discussion at our October 21, 2003, Agenda Conference, and upon review of the information obtained by our staff and from the parties, we find that the appropriate method to determine the meter error from which refunds should be calculated is to use the absolute percentage error based upon the average calculation for the lowest and highest demand during the refund period. We also find that FPL should not be required to backbill single account customers using Type 1V meters that under-registered billing demand, unless there is evidence of meter tampering or fraud. FPL should aggregate the bills of customers with multiple accounts and refund any net over-billing. FPL should not backbill customers with multiple accounts that show net under-billing. FPL should not aggregate multiple accounts of customers who requested meter tests for specific meters before October 22, 2002. With respect to the calculation of a refund for the specific meter identified in SUSI's January 24, 2003, complaint on behalf of one Target account, we find that 6.7 percent is the appropriate percent error to calculate a refund for that meter. We find that the refunds should be calculated over the 12-month period prior to removal of the Type 1V meter for all meters that over-registered demand outside of tolerance, including the meter for the specific Target complaint filed on January 24, 2003. Finally, we find that FPL should use the same rate schedule under which the accounts were billed through the defective meters to calculate the refunds and interest should be assessed on the amounts to be refunded and calculated in accordance with Rule 25-6.109, Florida Administrative

Code. Our reasons for these decisions are explained in detail below.

DECISION

Percent Meter Error for Refund Calculation

Three Commission rules affect our decision on this issue. First, Rule 25-6.052, Florida Administrative Code, describes the procedures used to test a meter to determine if it is inaccurate, that is, registers beyond tolerance limits. Second, Rule 25-6.058, Florida Administrative Code, defines the procedure used to determine the average meter error once the meter has been determined to be inaccurate beyond tolerance limits. Third, Rule 25-6.103, Florida Administrative Code, describes the procedure used for adjusting bills when a meter is found to be registering outside acceptable limits.

Rule 25-6.052(2)(a) provides that the acceptable percent error for lagged demand meters, which include the type of meter that is the subject of these complaints, is four percent of full-scale value when tested at any point between 25 percent and 100 percent of full-scale value. If a meter is found to register outside of this tolerance limit, the degree to which the meter is in error and the manner in which bills should be adjusted must be determined. Rule 25-6.103(1) subtitled "Fast Meters," states that whenever a meter is found to have an error in excess of the plus tolerance allowed in Rule 25-6.052, the utility shall refund to the customer the amount billed in error as determined by Rule 25-6.058. Rule 25-6.058, however, does not clearly provide an appropriate method for determining the amount billed in error for the demand meters in question in this case. Rule 25-6.058(3) states that for a polyphase meter used to measure a varying load, the average error shall be determined in one of the following ways:

> (a) The weighted algebraic average of its error at light load (approximately 10 percent rated test amperes) given a weight of one, its error at heavy load (approximately 100 percent rated test amperes) and 100 percent power factor given a weight of four, and at heavy load (approximately 100 percent rated test amperes) and 50 percent lagging power factor given a weight of two; or

(b) A single point, when calculating the error of a totally solid state meter, and the single point is an accurate representation of the error over the load range of the meter.

While thermal demand meters are polyphase meters, neither (a) nor (b) above are relevant to determining average error for demand meters. Part (b) is not applicable to this case because a thermal demand meter is not a solid state meter. Part (a) is relevant to calculating average error in energy (kWh) readings from watthour meters, but not demand (kW) readings from demand meters. Part (a) calls for measuring the error at light load (approximately 10 percent of rated test amperes). Because customers with demand meters are billed at the maximum demand for the billing period, a test at light load would not be relevant in calculating average error in demand readings. Further, Rule 25-6.052, which provides test procedures for measuring the accuracy of both energy and demand readings on meters, refers to Rule 25-6.058 to calculate error in energy readings from watthour meters, but it does not make a similar reference for demand readings from lagged demand meters.

SUSI proposes that refunds be based on the higher of (1) the error observed during the testing of the old meter or (2) the average error observed in comparing the new meter billing demands with the old meter billing demands for comparable months. This "higher of" method has no basis in the Commission's rules. In addition, while the first component of SUSI's proposed method is consistent with the requirement in Rule 25-6.103(3) that refunds be calculated based on the error demonstrated in a meter test, the second component is inconsistent with that requirement and does not have a basis in any Commission rule.

FPL and SUSI have agreed to test the meters at the single point of 80% of full scale. They have also agreed that if the kilowatt error divided by the full-scale kilowatt value is greater than four percent, the customer should receive a refund. This method is consistent with Rule 25-6.052(2)(a) as a reasonable means to determine whether a meter is inaccurate and whether a customer should receive a refund. FPL and SUSI have not agreed, however, on the method to calculate amount of the refund. We find that, for purposes of calculating the refund, it is reasonable to use the absolute percentage error based upon the average calculation for the lowest and highest billing demand during the refund period to

determine the number of kilowatts billed in error.[1] This method is appropriate because it is based on the actual loads that the customer experienced and uses actual (or absolute) error, and because our rules do not clearly provide a method for determining average meter error for demand meters for purposes of a refund.

Backbilling

As stated above, FPL proposed a procedure that it would use to remove, replace, and test Type 1V thermal demand meters, including the method for calculating refunds. The procedure calls for netting multiple account customers' registration errors, but not backbilling single account customers for any under-registration of demand. Multiple account customers would not be backbilled for any net under-registration.

Rule 25-6.103(2)(a), Florida Administrative Code, provides that if a meter is found to be slow, nonregistering, or partially registering, a utility may backbill the customer for a period not greater than twelve months from the date it notifies the customer of the meter error. Under FPL's proposal, no customer would be backbilled for Type 1V meters that under-registered billing demand outside of tolerance. While our rules do not address the netting procedure proposed by FPL, we believe the procedure is fair and reasonable, because no customer will be asked to pay for errors caused by under-registering Type 1V meters. We approve this procedure, with the one modification described below.

As noted, FPL's proposal calls for the removal and testing of all of its approximately 3,900 Type 1V thermal demand meters by January, 2003. Pursuant to Rule 25-6.060, Florida Administrative Code, a customer may request a meter test referee from the Commission. The Commission must then notify the utility of the request. Under the rule, the utility may not disturb the meter outside of the presence of a Commission representative once it has

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[1] We note that FPL compared the monthly billing demands of those Type 1V meters that over-registered demand with the comparable monthly billing demands of the replacement electronic meters. Our review of the data indicates that the comparisons did not yield a consistent degree of error upon which we could comfortably rely to determine a refund amount.

received notice of the request, unless authority to do so is first given in writing by the Commission or the customer. FPL was concerned that the Commission may receive a request for a meter test referee prior to a particular 1V meter being removed, but, in the time it would take for that request to be communicated from the Commission to FPL then to FPL's meter replacement crew, the meter may be removed in the normal course of FPL's planned replacement and testing program. Thus, before implementing its program, FPL requested authority to remove, outside the presence of a Commission representative, its Type 1V meters for which it had not already received a meter test referee request. By letter dated October 21, 2002, our General Counsel, pursuant to the rule, granted FPL's request for authority to remove the 1V meters outside the presence of a Commission representative, in order to improve the efficiency and expediency of the replacement program. This authority applied only to future, not pending, meter test referee requests, and was conditioned on FPL maintaining and documenting a continuous chain of custody for meters subject to such requests.

SUSI had pursued meter test referee requests and refunds on behalf of several customers prior to the grant of authority described above. Those customers' meters were not subject to the mass removal and testing program, including the netting process proposed by FPL for meters removed and tested under that program. In light of these facts, we find it appropriate to exempt any specific Type 1V meter for which a test was requested prior to October 22, 2003, from the multiple account netting process approved above.

<u>Percent Meter Error for Refund Calculation for January 24, 2003, Complaint</u>

On August 6, 2002, we received a letter from Target Stores requesting a refereed meter test. During testing it was observed that the meter in question had a "pusher" pointer that was bent. SUSI questioned the results of the meter test because of this mechanical problem. This meter became the subject of SUSI's January 24, 2003, complaint.

On a properly functioning meter, as load increases the pusher pointer pushes a second pointer, or maximum demand pointer, on the meter scale to the customer's maximum registered demand. As load

decreases, the pusher pointer recedes down the meter scale while the second pointer remains at the point of the customer's maximum registered demand. A customer's monthly demand charge is based on its maximum demand for that month as shown by the second pointer's position on the meter scale at the time the meter is read. The meter is reset after it is read.

SUSI claimed that the pusher pointer was contacting the maximum demand pointer prematurely, causing the demand pointer to read higher than it should. FPL asserted that, although the pusher pointer caused the meter to read high temporarily, the pusher pointer pulled the maximum demand pointer down the meter scale along with it as load decreased. FPL stated that this could even cause the meter to under register.

The refereed meter test showed an error of 3.14 percent over-registration when tested at 61.4 percent of full scale. This degree of over-registration is within the tolerance limits specified in Rule 25-6.052, Florida Administrative Code. FPL states that it inadvertently calculated the error to be 6.7 percent by including the effect of the bent pusher pointer in the calculation of error, but FPL agreed nevertheless to offer SUSI a refund using the 6.7 percent error figure.

SUSI and FPL could not agree on the amount of the refund due, and our staff asked FPL to re-test the meter with the bent pusher pointer to see if the results were repeatable. FPL re-tested the meter four times and determined that the resulting percent error was close to the original test error of 3.14 percent.

We believe that using a 6.7 percent error in this case is reasonable for purposes of calculating a refund for this customer. FPL is willing to use the 6.7 percent error and provide a refund on that basis. Also, the meter did have a bent pusher pointer and was over-registering. Even though the additional tests showed the meter was still registering within tolerance, we are not convinced that the bent pusher pointer may not have caused higher readings under actual field conditions.

Refund Time Period and Interest Rate

Rule 25-6.103(1), Florida Administrative Code, states, in pertinent part:

> Whenever a meter is found to have an error in excess of the plus tolerance allowed in Rule 25-6.052, the utility shall refund to the customer the amount billed in error . . . for one half of the period since the last test, said one half period shall not exceed twelve (12) months; except that if it can be shown that the error was due to some cause, the date of which can be fixed, the overcharges shall be computed back to but not beyond such date based upon available records.

SUSI claims that the meters have been in error since initial calibration and there is no physical mechanism that will cause the meters to over-register apart from miscalibration. FPL responds that although it does not know precisely the physical mechanism that will cause over-registration, utility data show that Type 1V meters can both over-register and under-register through time.

From the information received we have not been able to determine that the meter error for any of the meters in question was due to a cause the date of which can be fixed. Because of that uncertainty, we believe it is reasonable to limit any refunds to bills rendered during the 12-month period preceding the date the meter was removed.

Interest should be assessed on the refunded amount and should be calculated in accordance with Rule 25-6.109, Florida Administrative Code. During the period the meters were over-registering, the amount of money over-billed was unavailable for use by the customers and represents a cost to the customers that should be recouped in part through interest on the over-billed amount. All refunds to current customers should be paid with interest at the 30-day commercial paper rate as specified in Rule 25-6.109. Subsection (4) of Rule 25-6.109 sets forth the manner in which interest shall be calculated. Subsection (5) of the rule states that for customers still on the system, the refund shall be made on the bill, or if the customer is no longer on the system, the utility shall mail a check to the last known billing address of the customer. Subsection (6) of the rule requires the utility to provide monthly reports on the status of the refund. If any refunds remain unclaimed at the end of the refund period, the utility shall suggest a method of disposing of any unclaimed amounts, subject to Commission approval.

All refunds to current customers, with interest, will be in the form of a credit on the customers' bills beginning no later than the first billing cycle day of the second month after the Order requiring the refunds becomes final. Refunds to former customers shall be completed as expeditiously as reasonably possible.

Rate Schedules for Refund Calculation

To calculate the refunds, FPL should use the same rate schedule under which the accounts were billed through the defective meters. Under FPL's rate structure, accounts whose monthly demands are between 21 and 499 kilowatts (kW) are generally required to take service under the General Service Demand (GSD-1) rate schedule. To qualify for service under the lower General Service Large Demand 1 (GSLD-1) rate, accounts must have monthly billing demands of at least 500 kW. As a result, when the historic billing demands of some accounts are adjusted downward to correct for over-registering thermal demand meters, it appears that the accounts may not have qualified for service under the GSLD-1 rate schedule under which they were originally billed.

FPL has suggested that it may be appropriate to calculate refunds based on the rate that would have applied (i.e., the GSD-1 rate) had the meters been operating properly. Because the GSD-1 rate is higher than the GSLD-1 rate, such an adjustment results in lower refunds for the affected accounts. We do not believe such an adjustment is appropriate. Although a different rate schedule may have been applied had the metering error not occurred, the adjustment unfairly penalizes customers who were billed on the incorrect rate through no fault of their own. It is the utility's responsibility to ensure that its meters are operating properly and that customers are billed under the correct rate schedule based on their monthly demand. For these reasons, we find that FPL shall apply the same rate schedule under which accounts were originally billed through the defective meter to calculate any refunds due.

CONCLUSION

For the reasons explained above we resolve the complaints in this docket as follows. We find that the appropriate method to determine the meter error from which refunds should be calculated is to use the absolute percentage error based upon the average

calculation for the lowest and highest demand during the refund period. We also find that FPL shall not be required to backbill single account customers using Type 1V meters that under-registered billing demand, unless there is evidence of meter tampering or fraud. FPL shall aggregate the bills of customers with multiple accounts and refund any net over-billing. FPL shall not backbill customers with multiple accounts that show net under-billing. FPL shall not aggregate multiple accounts of customers who requested meter tests for specific meters before October 22, 2002. With respect to the calculation of a refund for the specific meter identified in SUSI's January 24, 2003, complaint on behalf of one Target account, we find that 6.7 percent is the appropriate percent error to calculate a refund for that meter. We find that the refunds shall be calculated over the 12-month period prior to removal of the Type 1V meter for all meters that over-registered demand outside of tolerance, including the meter for the specific Target complaint filed on January 24, 2003. Finally, we find that FPL shall use the same rate schedule under which the accounts were billed through the defective meters to calculate the refunds. Interest shall be assessed on the amounts to be refunded and calculated in accordance with Rule 25-6.109, Florida Administrative Code.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the complaints by Southeastern Utility Services, Inc., against Florida Power & Light Company concerning meter error in Type 1V thermal demand meters are resolved as set forth in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 19th day of November, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: /s/ Marcia Sharma
Marcia Sharma, Assistant Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

( S E A L )

MCB/WCK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 10, 2003.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

information coming into its possession pursuant to such inquiry shall be considered confidential and exempt from s. 119.07(1). Such material may be used in any administrative or judicial proceeding so long as the confidential or proprietary nature of the material is maintained.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50.

**350.123 Oaths; depositions; protective orders.**—The commission may administer oaths, take depositions, issue protective orders, issue subpoenas, and compel the attendance of witnesses and the production of books, papers, documents, and other evidence necessary for the purpose of any investigation or proceeding. Challenges to, and enforcement of, such subpoenas and orders shall be handled as provided in s. 120.569.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50; s. 91, ch. 96-410.

**350.124 Compelled testimony.**—If any person called to testify in a commission proceeding shall refuse to testify because of a claim of possible self-incrimination, the commission, after consultation with the appropriate state attorney, may apply to the chief judge of the appropriate judicial circuit for a judicial grant of immunity ordering the testimony of such person notwithstanding his or her objection, but in such case no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal prosecution.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50; s. 540, ch 95-148.

**350.125 Administrative law judges.**—Any provision of law to the contrary notwithstanding, the commission shall utilize administrative law judges of the Division of Administrative Hearings of the Department of Management Services to conduct hearings of the commission not assigned to members of the commission.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50; s. 122, ch. 92-279; s. 55, ch. 92-326; s. 92, ch. 96-410.

**350.127 Penalties; rules; execution of contracts.**

(1) The commission may impose upon any regulated company that is found to have refused to comply with or willfully violated any lawful rule or order of the commission, or any statute administered by the commission, a penalty for each such offense of not more than $5,000, to be fixed, imposed, and collected by the commission, or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by the commission. Each day that such refusal or violation continues shall constitute a separate offense. Each penalty shall be a lien upon the real and personal property of the regulated company, enforceable by the commission as a statutory lien under chapter 85. The net proceeds from the enforcement of any such lien shall be deposited in the General Revenue Fund.

(2) The commission is authorized to adopt, by affirmative vote of a majority of the commission, rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

(3) The commission may designate one or more employees to execute contracts on behalf of the commission.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50; s. 71, ch 98-200.

**350.128 Judicial review.**—

(1) As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall, upon petition, review any action of the commission relating to rates or service of utilities providing electric, gas, or telephone service. The District Court of Appeal, First District, shall, upon petition, review any other action of the commission.

(2) Notice of such review shall be given by the petitioner to all parties who entered appearances of record in the proceedings before the commission in which the order sought to be reviewed was made.

(3) Such parties may file briefs in support of their interests, as such interests may appear, within the time and in the manner provided by the Florida Rules of Appellate Procedure.

(4) Such parties shall be entitled as a matter of right to make oral argument in support of their interests, as such interests may appear, in any case in which oral argument is granted by the court on the application of the petitioner or the respondent.

History.—ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50

[1]**350.80 Coal slurry pipeline companies regulated.**

(1) Any person, corporation, or other legal entity which exercises or intends to exercise powers of eminent domain pursuant to s. 361.08, or which owns or operates a coal slurry pipeline which was constructed on property acquired by eminent domain, shall be subject to regulation as a common carrier by the Florida Public Service Commission, unless such regulation is preempted by regulation of the [2]Interstate Commerce Commission, and then only to the extent that such regulation is actually preempted by the [2]Interstate Commerce Commission, to assure fairness in rates, rate structure or tariffs, and conditions of service.

(2) All coal slurry pipeline companies, as common carriers, shall be subject to the rules and regulations of the Florida Public Service Commission relating thereto and all applicable laws, including, but not limited to, those governing common carriers as defined in [3]s. 350.11. No coal slurry pipeline company shall discriminate between or against any person, corporation, public utility, municipality, or other legal entity in regard to facilities furnished, services rendered, or rates charged for the transportation of coal or its derivatives. All contracts or agreements between any coal slurry pipeline company and any person, corporation, public utility, municipality, or other legal entity for the transportation of coal or its derivatives shall be submitted to the Florida Public Service Commission for review and approval prior to their execution. The commission shall adopt rules and regulations to ensure that all contracts, rates, and charges involving the transportation of coal or its derivatives by pipeline shall be just and reasonable, nondiscriminatory, and offer no preference to any person, corporation, public utility, municipality, or other legal entity. The commission shall prohibit any contract



EXHIBIT COMPOSITE B
tabbies

# CHAPTER 366

# PUBLIC UTILITIES


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366.015 Interagency liaison.
366.02 Definitions.
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366.85 Responsibilities of Division of Consumer Services.


**366.01 Legislative declaration.**—The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

History.—s. 1, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.015 Interagency liaison.**—The commission is directed to provide for, and assume primary responsibility for, establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction. This liaison shall be conducted at the policymaking levels as well as the department, division, or bureau levels. Active participation in other agencies' public hearings is encouraged to transmit the commission's policy positions and information requirements, in order to provide for more efficient regulation.

History.—s. 6, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 1, 16, ch. 80-35; s. 2, ch. 81-318; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.02 Definitions.**—As used in this chapter:

(1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas.

(2) "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

(3) "Commission" means the Florida Public Service Commission.

History.—s. 2, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 2, 16, ch. 80-35; s. 2, ch. 81-318; ss. 1, 20, 22, ch. 89-292; s. 4, ch. 91-429; s. 14, ch. 92-284.

**366.03 General duties of public utility.**—Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

History.—s. 3, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318; ss. 1, 15, ch. 82-25; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.031 Definitions; preference relating to cable television prohibited; penalties.**—

(1) As used in this section, the term:

(a) "Affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(b) "Cable service" means:

1. The one-way transmission to subscribers of video programming or any other programming service; and

2. Subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

(c) "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;

3. A facility of a common carrier, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or

4. Any facilities of any electric utility used solely for operating its electric utility systems.

(d) "Video programming" means programming provided by or generally considered comparable to programming provided by a television broadcast station or cable system.

(2) No electric utility shall make or give any preference or advantage to any person as an accommodation or inducement to that person to contract with or take the services of any entity which is an affiliate of such electric utility and which entity provides video programming to persons within all or any part of the service area of such electric utility.

(3) No electric utility shall make or give any preference or advantage over any entity which is not an affiliate of such electric utility, and which entity provides video programming to persons within all or any part of the service area of such electric utility, to any entity which is an affiliate of such electric utility and which entity provides video programming to persons within all or any part of the service area of such electric utility.

(4) Upon a finding by a court of competent jurisdiction that either any electric utility or its affiliate providing video programming services within all or any part of the service area of the electric utility has violated the provisions of this section, the court:

(a) May award actual damages to any other entity not an affiliate of the electric utility providing video programming services to persons within all or any part of the service area of the electric utility, and may grant injunctive relief.

(b) Shall award costs of any action, together with reasonable attorney's fees, to the prevailing party.

History.—s. 4, ch. 87-266; s. 22, ch. 89-292; s. 4, ch. 91-429.

**366.04 Jurisdiction of commission.**—

(1) In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; assumption by it of liabilities or obligations as guarantor, endorser, or surety; and the issuance and sale of its securities, except a security which is a note or draft maturing not more than 1 year after the date of such issuance and sale and aggregating (together with all other then-outstanding notes and drafts of a maturity of 1 year or less on which such public utility is liable) not more than 5 percent of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of issue. The commission, upon application by a public utility, may authorize the utility to issue and sell securities of one or more offerings, or of one or more types, over a period of up to 12 months; or, if the securities are notes or drafts maturing not more than 1 year after the date of issuance and sale, the commission, upon such application, may authorize the utility to issue and sell such securities over a period of up to 24 months. The commission may take final action to grant an application by a public utility to issue and sell securities or to assume liabilities or obligations after having given notice in the Florida Administrative Weekly published at least 7 days in advance of final agency action. In taking final action on such application, the commission may deny authorization for the issuance or sale of a security or assumption of a liability or obligation if the security, liability, or obligation is for nonutility purposes; and shall deny authorization for the issuance or sale of a security or assumption of a liability or obligation if the financial viability of the public utility is adversely affected such that the public utility's ability to provide reasonable service at reasonable rates is jeopardized. Securities issued by a public utility or liabilities or obligations assumed by a public utility as guarantor, endorser, or surety pursuant to an order of the commission, which order is certified by the clerk of the commission and which order approves or authorizes the issuance and sale of such securities or the assumption of such liabilities or obligations, shall not be invalidated by a modification, repeal, or amendment to that order or by a supplemental order; however, the commission's approval of the issuance of securities or the assumption of liabilities or obligations shall constitute approval only as to the legality of the issue or assumption, and in no way shall it be considered commission approval of the rates, service, accounts, valuation, estimates, or determinations of cost or any other such matter. The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

(a) To prescribe uniform systems and classifications of accounts.

(b) To prescribe a rate structure for all electric utilities.

(c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

(f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.

No provision of this chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby.

(3) In the exercise of its jurisdiction, the commission shall have the authority over natural gas utilities for the following purposes:

(a) To approve territorial agreements between and among natural gas utilities. However, nothing in this chapter shall be construed to alter existing territorial agreements between the parties to such agreements.

(b) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

(c) For purposes of this subsection, "natural gas utility" means any utility which supplies natural gas or manufactured gas or liquefied gas with air admixture, or similar gaseous substance by pipeline, to or for the public and includes gas public utilities, gas districts, and natural gas utilities or municipalities or agencies thereof.

(4) Any customer shall be given an opportunity to present oral or written communications in commission proceedings to approve territorial agreements or resolve territorial disputes. If the commission proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it. Any substantially affected customer shall have the right to intervene in such proceedings.

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(6) The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities. In adopting safety standards, the commission shall:

(a) Adopt the 1984 edition of the National Electrical Safety Code (ANSI C2) as initial standards; and

(b) Adopt, after review, any new edition of the National Electrical Safety Code (ANSI C2).

The standards prescribed by the current 1984 edition of the National Electrical Safety Code (ANSI C2) shall constitute acceptable and adequate requirements for the protection of the safety of the public, and compliance with the minimum requirements of that code shall constitute good engineering practice by the utilities. The administrative authority referred to in the 1984 edition of the National Electrical Safety Code is the commission. However, nothing herein shall be construed as superseding, repealing, or amending the provisions of s. 403.523(1) and (10).

History.—s. 4, ch. 26545, 1951; s. 1, ch. 63-268; s. 1, ch. 63-279; s. 1, ch. 65-52; s. 1, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 3, 16, ch. 80-35; s. 2, ch. 81-318; s. 4, ch. 86-173; ss. 2, 20, 22, ch. 89-292; s. 50, ch. 90-331; s. 4, ch. 91-429; s. 13, ch. 95-146.

**366.041 Rate fixing; adequacy of facilities as criterion.—**

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; however, no service complaints

lic utility may bring the records back into the state for review.

History.—s. 5, ch. 26545, 1951; s. 2, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 53, ch. 78-95; ss. 5, 16, ch. 80-35; s. 1, ch. 81-131; s. 2, ch. 81-318; ss. 4, 20, 22, ch. 89-292; s. 51, ch. 90-331; s. 4, ch. 91-429; s. 3, ch. 93-35; s. 552, ch. 95-148; s. 72, ch. 98-200.

**366.051 Cogeneration; small power production; commission jurisdiction.**—Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer. The electric utility in whose service area a cogenerator or small power producer is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source. The commission may use a statewide avoided unit when setting full avoided capacity costs. If the cogenerator or small power producer provides adequate security, based on its financial stability, and no costs in excess of full avoided costs are likely to be incurred by the electric utility over the term during which electricity is to be provided, the commission shall authorize the levelization of payments and the elimination of discounts due to risk factors in determining the rates. Public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. Notwithstanding any other provision of law, power generated by the customer and provided by the utility to the customers' facility at another location is subject to the gross receipts tax imposed under s. 203.01 and the use tax imposed under s. 212.06. Such taxes shall apply at the time the power is provided at such other location and shall be based upon the cost price of such power as provided in s. 212.06(1)(b).

History.—ss. 5, 22, ch. 89-292; s. 4, ch. 91-429.

**366.055 Availability of, and payment for, energy reserves.**—

(1) Energy reserves of all utilities in the Florida energy grid shall be available at all times to ensure that grid reliability and integrity are maintained. The commission is authorized to take such action as is necessary to assure compliance. However, prior commitments as to energy use:

(a) In interstate commerce, as approved by the Federal Energy Regulatory Commission;

(b) Between one electric utility and another, which have been approved by the Federal Energy Regulatory Commission; or

(c) Between an electric utility which is a part of the energy grid created herein and another energy grid

shall not be abridged or altered except during an energy emergency as declared by the Governor and Cabinet.

(2)(a) When the energy produced by one electric utility is transferred to another or others through the energy grid and under the powers granted by this section, the commission shall direct the appropriate recipient utility or utilities to reimburse the producing utility in accordance with the latest wholesale electric rates approved for the producing utility by the Federal Energy Regulatory Commission for such purposes.

(b) Any utility which provides a portion of those transmission facilities involved in the transfer of energy from a producing utility to a recipient utility or utilities shall be entitled to receive an appropriate reimbursement commensurate with the transmission facilities and services provided. However, no utility shall be required to sell purchased power to a recipient utility or utilities at a rate lower than the rate at which the power is purchased from a producing utility.

(3) To assure efficient and reliable operation of a state energy grid, the commission shall have the power to require any electric utility to transmit electrical energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, subject to the provisions hereof.

History.—s. 3, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 6, 16, ch. 80-35; s. 2, ch. 81-318; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.06 Rates; procedure for fixing and changing.**

(1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or

going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

(2) Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

(3) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such public utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such public utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the public utility shall be refunded or disposed of by the public utility as the commission may direct; however, no such funds shall accrue to the benefit of the public utility. The commission shall take final commission action in the docket and enter its final order within 12 months of the commencement date for final agency action. As used in this subsection, the "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why said applicant has failed to meet the minimum filing requirements. Such statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided herein. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

(4) A natural gas utility or a public electric utility whose annual sales to end-use customers amount to less than 500 gigawatt hours may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule. The commission shall enter its vote on the proposed agency action within 5 months of the commencement date for final agency action. If the commission's proposed action is protested, the final decision must be rendered by the commission within 8 months of the date the protest is filed. At the expiration of 5 months following the commencement date for final agency action, if the commission has not taken action or if the commission's action is protested by a party other than the utility, the utility may place its requested rates into effect under bond, escrow, or corporate undertaking subject to refund, upon notice to the commission and upon filing the appropriate tariffs. The utility must keep accurate records of amounts received as provided by subsection (3).

History.—s. 6, ch. 26545, 1951; s. 4, ch. 74-195; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 7, 16, ch. 80-35; s. 2, ch. 81-318; ss. 8, 20, 22, ch. 89-292; s. 4, ch. 91-429; s. 5, ch. 93-35; s. 5, ch. 95-328.

**366.07 Rates; adjustment.**—Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

History.—s. 7, ch. 26545, 1951; s. 24, ch. 57-1; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318; ss. 9, 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.071 Interim rates; procedure.—**

(1) The commission may, during any proceeding for a change of rates, upon its own motion, or upon petition from any party, or by a tariff filing of a public utility, authorize the collection of interim rates until the effective date of the final order. Such interim rates may be based upon a test period different from the test period used in the request for permanent rate relief. To establish a prima facie entitlement for interim relief, the commission, the petitioning party, or the public utility shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return calculated in accordance with subsection (5).

(2)(a) In a proceeding for an interim increase in rates, the commission shall authorize, within 60 days of the filing for such relief, the collection of rates sufficient to earn the minimum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. The difference between the interim rates and the previously authorized rates shall be collected under bond or corporate undertaking subject to refund with interest at a rate ordered by the commission.

(b) In a proceeding for an interim decrease in rates, the commission shall authorize, within 60 days of the filing for such relief, the continued collection of the previously authorized rates; however, revenues collected under those rates sufficient to reduce the achieved rate of return to the maximum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. shall be placed under bond or corporate undertaking subject to refund with interest at a rate ordered by the commission.

(c) The commission shall determine whether a corporate undertaking may be filed in lieu of the bond.

(3) In granting such relief, the commission may, in an expedited hearing but within 60 days of the commencement of the proceeding, upon petition or upon its own motion, preclude the recovery of any extraordinary or imprudently incurred expenditures or, for good cause shown, increase the amount of the bond or corporate undertaking.

(4) Any refund ordered by the commission shall be calculated to reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis, but the refund shall not be in excess of the amount of the revenues collected subject to refund and in accordance with paragraph (2)(b). In addition, the commission may require interest on the refund at a rate established by the commission.

(5)(a) In setting interim rates or setting revenues subject to refund, the commission shall determine the revenue deficiency or excess by calculating the difference between the achieved rate of return of a public utility and its required rate of return applied to an average investment rate base or an end-of-period investment rate base.

(b) For purposes of this subsection:

1. "Achieved rate of return" means the rate of return earned by the public utility for the most recent 12-month period. The achieved rate of return shall be calculated by applying appropriate adjustments consistent with those which were used in the most recent individual rate proceeding of the public utility and annualizing any rate changes occurring during such period.

2. "Required rate of return" shall be calculated as the weighted average cost of capital for the most recent 12-month period, using the last authorized rate of return on equity of the public utility, the current embedded cost of fixed-rate capital, the actual cost of short-term debt, the actual cost of variable-cost debt, and the actual cost of other sources of capital which were used in the last individual rate proceeding of the public utility.

3. In a proceeding for an interim increase, the term "last authorized rate of return on equity" used in subparagraph 2. means the minimum of the range of the last authorized rate of return on equity established in the most recent individual rate proceeding of the public utility. In a proceeding for an interim decrease, the term "last authorized rate of return on equity" used in subparagraph 2. means the maximum of the range of the last authorized rate of return on equity established in the most recent individual rate proceeding of the public utility. The last authorized return on equity for purposes of this subsection shall be established only: in the most recent rate case of the utility; in a limited scope proceeding for the individual utility; or by voluntary stipulation of the utility approved by the commission.

History.—s. 8, ch. 80-35; s. 2, ch. 81-318; ss. 3, 15, ch. 82-25; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429; s. 6, ch. 93-35; s. 6, ch. 95-328.

**366.072 Rate adjustment orders.**—Any order issued by the commission adjusting general increases or reductions of the rates of an electric or gas company shall be reduced to writing including any dissenting or concurring opinions within 20 days of the official vote of the commission. Within said 20 days, the commission shall also mail a copy of the order to the clerk of the circuit court of each county in which customers are served who are affected by the rate adjustment, which copy shall be kept on file and made available to the public. The commission shall notify all parties of record in the proceeding of the date of such mailing. Such an order shall not be considered rendered for purposes of appeal, rehearing, or judicial review until the date the copies are mailed as required by this section. This provision shall not delay the effective date of the order. Such an order shall be considered rendered on the date of the official vote for the purposes of s. 366.06(3).

History.—s. 1, ch. 78-137; s. 10, ch. 80-35; s. 2, ch. 81-318; ss. 10, 20, 22, ch. 89-292; s. 4, ch. 91-429.

**366.075 Experimental and transitional rates.—**

(1) The commission is authorized to approve rates on an experimental or transitional basis for any public utility to encourage energy conservation or to encourage efficiency. The application of such rates may be for limited geographic areas and for a limited period.

(2) The commission is authorized to approve the geographic area used in testing experimental rates and shall specify in the order setting those rates the area affected. The commission may extend the period designated for the test if it determines that further testing is

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**FLORIDA ADMINISTRATIVE CODE ANNOTATED**
**TITLE 25. PUBLIC SERVICE COMMISSION**
**CHAPTER 25-6. ELECTRIC SERVICE BY ELECTRIC PUBLIC UTILITIES**
**PART VI. CUSTOMER RELATIONS**
Current through May 1, 2004

25-6.109. Refunds.

(1) Applicability. With the exception of deposit refunds and refunds associated with adjustment factors, all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission.

(2) Timing of Refunds. Refunds must be made within ninety (90) days of the Commission's order unless a different time frame is prescribed by the Commission. Unless a stay has been requested in writing and granted by the Commission, a motion for reconsideration of an order requiring a refund will not delay the timing of the refund. In the event that a stay is granted pending reconsideration, the timing of the refund shall commence from the date of the order disposing of any motion for reconsideration. This rule does not authorize any motion for reconsideration not otherwise authorized by Chapter 25-22, Florida Administrative Code.

(3) Basis of Refund. Where the refund is the result of a specific rate change, including interim rate increases and the refund can be computed on a per customer basis, that will be the basis of the refund. In such cases, refunds may by made by either recalculating the affected customer's bill or by applying an appropriate refund factor to the consumption used by the customer during the refund period. However, where the refund is not related to specific rate changes, such as a refund for overearnings, the refund shall be made to customers of record as of a date specified by the Commission. In such case, refunds shall be made on the basis of consumption. Per customer refund refers to a refund to every customer receiving service during the refund period. Customer of record refund refers to a refund to every customer receiving service as of a date specified by the Commission.

(4) Interest.

(a) In the case of refunds which the Commission orders to be made with interest, the average monthly interest rate until the refund is posted to the customer's account shall be based on the thirty (30) day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of $1,000 as regularly published in the Wall Street Journal.

(b) This average monthly interest rate shall be calculated for each month of the refund period:

1. By adding the published interest rate in effect for the last business day of the month prior to each month of the refund period and the published rate in effect for the last business day of each month of the refund period divided by twenty-four (24) to obtain the average monthly interest rate;

2. The average monthly interest rate for the month prior to distribution shall be the same as the last calculated average monthly interest rate.

(c) The average monthly interest rate shall be applied to the sum of the previous month's ending balance (including monthly interest accruals) and the current month's ending balance divided by two (2) to accomplish a compounding effect.

(d) Interest Multiplier. When the refund is computed for each customer, an interest multiplier may be applied against the amount of each customer's refund in lieu of a monthly calculation of the interest for each customer. The interest multiplier shall be calculated by dividing the total amount refundable to all customers, including interest, by the total amount of the refund, excluding interest. For the purpose of calculating the interest multiplier, the utility may, upon approval by the Commission, estimate the monthly refundable amount.

(e) Commission staff shall provide applicable interest rate figures and assistance in calculations under this Rule upon request of the affected utility.

(5) Method of Refund Distribution. For those customers still on the system, a credit shall be made on the bill. In the event the refund is for a greater amount than the bill, the remainder of the credit shall be carried forward until the refund is completed. If

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the customer so requests, a check for any negative balance must be sent to the customer within ten (10) days of the request.

For customers entitled to a refund but no longer on the system, the company shall mail a refund check to the last known billing address except that no refund for less than $1.00 will be made to these customers.

(6) Security for Money Collected Subject to Refund. In the case of money being collected subject to refund, the money shall be secured by a bond unless the Commission specifically authorizes some other type of security such as placing the money in escrow, approving a corporate undertaking, or providing a letter of credit. The Commission may require the company to provide a report by the 10th of each month indicating the monthly and total amount of money subject to refund as of the end of the preceding month. The report shall also indicate the status of whatever security is being used to guarantee repayment of the money.

(7) Refund Reports. During the processing of the refund, monthly reports on the status of the refund shall be made by the 10th of the following month. In addition, a preliminary report shall be made within thirty (30) days after the date the refund is completed and again 90 days thereafter. A final report shall be made after all administrative aspects of the refund are completed. The above reports shall specify the following:

(a) The amount of money to be refunded and how that amount was computed;

(b) The amount of money actually refunded;

(c) The amount of any unclaimed refunds; and

(d) The status of any unclaimed amounts.

(8) With the last report under subsection (7) of this Rule, the company shall suggest a method for disposing of any unclaimed amounts. The Commission shall then order a method of disposing of the unclaimed funds.

Specific Authority 350.127(2) FS. Law Implemented 366.03, 366.04(2)(f), 366.06(3), 366.071, 366.071(2) FS. History--New 8-18- 83.

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# CHAPTER 687

## INTEREST AND USURY; LENDING PRACTICES


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687.01 **Rate of interest in absence of contract.**—In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03.

History.—s. 1, ch. 1483, 1866; ss. 1, 2, ch. 1562, 1866; RS 2320; GS 3103; RGS 4849; CGL 6936; s. 1, ch. 22745, 1945; s. 1, ch. 82-42; s. 10, ch. 94-239.

687.02 **"Usurious contracts" defined.**—

(1) All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, if such loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071.

(2) As amended by chapter 79-592, Laws of Florida, chapter 79-274, Laws of Florida, which amended subsection (1):

(a) Shall apply only to loans, advances of credit, or lines of credit made on or subsequent to July 1, 1979, and to loans, advances of credit, or lines of credit made prior to that date if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise; and

(b) Shall not be construed as diminishing the force and effect of any laws applying to loans, advances of credit, or lines of credit, other than to those mentioned in paragraph (a), completed prior to July 1, 1979.

History.—s. 1, ch. 4022, 1891; GS 3104; s. 1, ch. 5960, 1909; RGS 4850; CGL 6937; s. 1, ch. 29705, 1955; s. 1, ch. 73-298; ss. 12, 15, ch. 79-274; s. 1, ch. 79-592; s. 1, ch. 80-310

687.03 **"Unlawful rates of interest" defined; proviso.**—

(1) Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest. However, if any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, it shall not be usury or unlawful to reserve, charge, or take interest thereon unless the rate of interest exceeds the rate prescribed in s. 687.071. The provisions of this section shall not apply to sales of bonds in excess of $100 and mortgages securing the same, or money loaned on bonds.

(2)(a) The provisions of this section and of s. 687.02 shall not apply to loans or other advances of credit made pursuant to:

1. A commitment to insure by the Federal Housing Administration.

2. A commitment to guarantee by the United States Department of Veterans Affairs.

3. A commitment to purchase a loan issued by the Federal National Mortgage Association; Government National Mortgage Association; Federal Home Loan Mortgage Corporation; any department, agency, or instrumentality of the Federal Government; or any successor of any of them, pursuant to any provision of the acts of Congress or federal regulations.

(b) This act shall apply only to loans or advances of credit made subsequent to the effective date of this act. All present laws shall remain in full force and effect as to loans or advances of credit made prior to the effective date of this act.



tabbles' EXHIBIT COMPOSITE C

# CHAPTER 55

## JUDGMENTS

55.01 Judgments; general form.
55.03 Judgments; rate of interest, generally.
55.04 Judgments; rate of interest, bonds of county, etc.
55.05 Judgments; power of attorney to confess invalid.
55.07 Judgments; effect of failure to record.
55.071 Judgments; effect of invalid affidavit or oath.
55.081 Statute of limitations, lien of judgment.
55.10 Judgments, orders, and decrees; lien of all, generally; extension of liens; transfer of liens to other security.
55.11 Judgments; no lien against municipalities.
55.13 Judgments; rights of sureties, etc.
55.141 Satisfaction of judgments and decrees; duties of clerk and judge.
55.145 Discharge of judgments in bankruptcy.
55.146 Certain property exempt.
55.201 Central database of judgment liens on personal property.
55.202 Judgments, orders, and decrees; lien on personal property.
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55.205 Effect of judgment lien.
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55.501 Florida Enforcement of Foreign Judgments Act; short title.
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55.503 Recording and status of foreign judgments; fees.
55.505 Notice of recording; prerequisite to enforcement.
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55.601 Uniform Out-of-country Foreign Money-Judgment Recognition Act; short title.
55.602 Definitions.
55.603 Applicability.
55.604 Recognition and enforcement.
55.605 Grounds for nonrecognition.
55.606 Personal jurisdiction.
55.607 Stay in case of appeal.

55.01 Judgments; general form.—

(1) In all actions where either party recovers a sum of money, the amount to which he or she is entitled may be awarded by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

(2) Each final judgment shall contain thereon the address and the social security number, if known to the prevailing party, of each person against whom judgment is rendered. Errors in names, addresses, or social security numbers or failure to include same shall in no way affect the validity or finality of a final judgment.

History.—s. 40, ch. 1096, 1861; RS 1171; GS 1598; RGS 2800; CGL 4486; s. 9, ch. 67-254; s. 1, ch. 79-387; s. 9, ch. 93-250; s. 293, ch. 95-147.

55.03 Judgments; rate of interest, generally.—

(1) On December 1 of each year, the Chief Financial Officer shall set the rate of interest that shall be payable on judgments or decrees for the year beginning January 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate. The Chief Financial Officer shall inform the clerk of the courts and chief judge for each judicial circuit of the rate that has been established for the upcoming year. The interest rate established by the Chief Financial Officer shall take effect on January 1 of each following year. Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Chief Financial Officer for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation.

(2) Any judgment for money damages or order for a judicial sale and any process or writ directed to a sheriff for execution shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment accrues on the judgment until it is paid.

(3) The interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid.

(4) A sheriff shall not be required to docket and index or collect on any process, writ, judgment, or decree, described in subsection (2), and entered after the effective date of this act, unless such process, writ, judgment, or decree indicates the rate of interest. For purposes of this subsection, if the process, writ, judgment, or decree refers to the statutory rate of interest described in subsection (1), such reference shall be deemed to indicate the rate of interest.

History.—s. 1, ch. 1562, 1866, RS 1176; GS 1604; RGS 2806; CGL 4493; s. 1, ch. 16051, 1933; s. 9, ch. 67-254; s. 7, ch. 77-354; s. 8, ch. 79-396, ss. 1, 2, ch. 80-110; s. 1, ch. 81-113; s. 37, ch. 81-259; s. 8, ch. 94-239; s. 4, ch. 98-410; s. 101, ch. 2003-261.

**55.04** Judgments; rate of interest, bonds of county, etc.—All judgments and decrees rendered on any bonds or other written evidence of debt of any county, special road and bridge districts or any county for the use and benefit of any special road and bridge districts or incorporated city or town or taxing district bear interest at the rate of 5 percent a year. When a judgment or decree is rendered on a bond or other written evidence of debt providing for a lesser rate of inter-

**H**

Supreme Court of Florida.

KISSIMMEE UTILITY AUTHORITY, Petitioner,
v.
BETTER PLASTICS, INC., Respondents.

No. 71073.

May 26, 1988.

Customer owed refund for overcharges by electric service public utility claimed entitlement to prejudgment interest. The Circuit Court, Osceola County, Rom W. Powell, J., denied prejudgment interest and appeal was taken. The District Court of Appeal, 511 So.2d 402, reversed and remanded, but certified question as one of great public importance. The Supreme Court, Kogan, J., held that: (1) municipal utility was liable to customer for prejudgment interest on overcharge refund, and (2) failure of utility to raise statute of limitations defense before moving for summary judgment waived such defense.

So ordered.

West Headnotes

[1] **Interest** 39(2.20)
219k39(2.20) Most Cited Cases

Municipal utility providing electrical service was liable to customer for prejudgment interest on overcharge refund, regardless of whether utility was regulated public utility. West's F.S.A. § 687.01.

[2] **Appeal and Error** 173(10)
30k173(10) Most Cited Cases

Failure to plead statute of limitations defense prior to moving for summary judgment precluded raising such issue for first time upon opposing party's appeal from order granting summary judgment. West's F.S.A. § 95.11; West's F.S.A. RCP Rule 1.110(d).

*46 Edward Brinson of Brinson, Smith & Smith, P.A., Kissimmee, for petitioner.

Jeffry R. Jontz and Steven L. Brannock of Holland & Knight, Tampa, for respondents.

William S. Bilenky, Gen. Counsel and Mary Jane Lord, Associate Gen. Counsel, Florida Public Service Com'n, Tallahassee, for intervenor.

KOGAN, Justice.

Pursuant to article V, section 3(b)(4) of the Florida Constitution, we review *Better Plastics, Inc. v. Kissimmee Utility Authority*, 511 So.2d 402 (Fla. 5th DCA 1987), to answer the following question certified as one of great public importance:

> *47 IS A REGULATED PUBLIC UTILITY IN FLORIDA LIABLE TO CUSTOMERS FOR PREJUDGMENT INTEREST ON OVERCHARGE REFUNDS?

On the authority of *Argonaut Insurance Company v. May Plumbing Co.*, 474 So.2d 212 (Fla.1985), we answer the question in the affirmative and approve the decision of the district court.

Kissimmee Utility Authority (Authority), a municipal utility, provides electrical service to Better Plastics, Inc. (Better Plastics). For the period of 1972 through 1985, the Authority overcharged Better Plastics in the amount of $107,674.17 for electrical service by using a multiplier of 80 when it should have been 60. On February 27, 1986, the Authority acknowledged the overcharge and issued a check for the overcharge amount to Better Plastics. On March 5, 1986, Better Plastics filed suit against the Authority, alleging the Authority was liable for interest on the overcharge amount. The Authority denied it owed any interest on the overcharge refund, asserting that as a regulated public utility it is governed by Florida Administrative Code Rule 25-6.106(2), [FN1] which does not permit or authorize the payment of interest to a customer as a result of overbilling for energy. [FN2]

> FN1. Florida Administrative Code Rule 25-6.106(2) provides:
> In the event of other overbillings not provided for in Rule 25-6.103, the utility shall refund the overcharge to the customer for the period during which the overcharge occurred based on available records. If commencement of the overcharging cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer. The amount and period of the adjustment shall be based on the available records. The refund shall not include any part of a minimum charge.

> FN2. Interestingly, at oral argument the Public Service Commission, appearing as intervenor, asserted for the first time in this appeal that its regulatory powers do not extend to the Authority because the Authority is a municipally owned utility. Our decision in *Argonaut* is controlling regardless of the Authority's status as a "regulated public utility."

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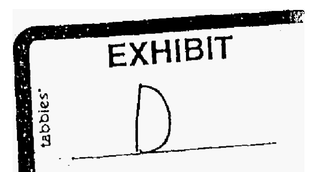

Both parties moved for summary judgment, asserting that there were no disputed issues of material fact. On October 20, 1986, the trial court granted summary judgment in favor of the Authority. Better Plastics appealed, and the Fifth District Court of Appeal reversed and remanded, finding that a regulated public utility has the legal obligation to pay prejudgment interest on overcharge refunds under section 687.01, Florida Statutes (1986), and *Argonaut Insurance Company v. May Plumbing Co.*

[1] Even though rule 25-6.106(2) does not specifically authorize the payment of prejudgment interest as part of the overcharge refund due a customer, we agree with the district court that a regulated public utility has the legal obligation to pay interest on overcharge refunds. In light of our decision in *Argonaut*, it is unnecessary for the Public Service Commission to specifically refer to prejudgment interest in its rules to assure utility customers are fully compensated in the event of an overbilling. [FN3]

> FN3. At oral argument the Public Service Commission stated that utility customers are routinely granted interest on overcharge refunds, but the issue is not commonly raised because it is settled before litigation.

In *Argonaut* we reaffirmed the long-standing principle in Florida that prejudgment interest is merely another element of pecuniary damages. For a plaintiff to be fully compensated, the award must include damages suffered from the loss of the use of the money because "the loss itself is a wrongful deprivation by the defendant of the plaintiff's property." 474 So.2d at 215. Once liability has been determined and the amount of damages set, it is merely a ministerial duty to add the appropriate amount of interest to the principal amount of damages awarded. *Id.* Whether an award of prejudgment interest is appropriate in this case does not turn on the Authority's status as a regulated public utility. In Florida once damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss. *Id.*

[2] Notwithstanding the rule that a plaintiff be fully compensated from the date of the loss, the Authority argues that if Florida law requires payment of prejudgment interest on overcharge refunds, then *48 a portion of Better Plastics' claim and the interest thereon is barred by the statute of limitations, section 95.11, Florida Statutes (1986). The Authority admits in its initial brief on the merits that it was aware of the time bar argument it now asserts; however, the Authority claims this defense was not raised because the Authority chose to defend the action on the ground that rule 25- 6.106 was a clear and lawful limitation on its duty to pay prejudgment interest on overcharge refunds. We decline to address this issue because the statute of limitations is an affirmative defense that must be pleaded at trial. Fla.R.Civ.P. 1.110(d). "Failure to raise an affirmative defense prior to a plaintiff's motion for summary judgment constitutes a waiver of that defense." *Wyman v. Robbins*, 513 So.2d 230 (Fla. 1st DCA 1987). The Authority waived the statute of limitations defense by electing not to plead it even though the Authority claims to have been aware the defense was available. The Authority's failure to plead the statute of limitations below bars it from raising the issue for the first time on appeal. *Dober v. Worrell*, 401 So.2d 1322 (Fla.1981). Therefore, the Authority is required to pay prejudgment interest at the statutory rate in effect for each year from 1972 through 1985. The amount of prejudgment interest to be paid absent a controlling contractual provision has been set by the legislature. [FN4]

> FN4. Section 687.01, Florida Statutes contains the statutory interest rate set by the legislature that controls prejudgement interest. Periodically, this rate has been changed to reflect current market conditions. The interest rate in effect for the particular year in question shall be applied when figuring the interest owed on the overcharge amount for that year.

Because our decision in *Argonaut Insurance Company v. May Plumbing Co.* is controlling, we answer the certified question in the affirmative and approve the decision of the Fifth District Court of Appeal.

It is so ordered

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT and GRIMES, JJ., concur.

526 So.2d 46, 13 Fla. L. Weekly 339

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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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|---|---|---|
| OCEAN PROPERTIES, LTD., | ) | |
| | ) | |
| Petitioner, | ) | Case Number 04-2250RX |
| v. | ) | |
| | ) | |
| PUBLIC SERVICE COMMISSION | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

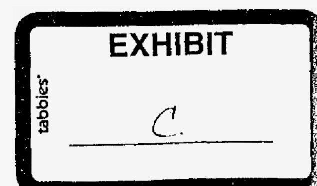
JOINT MOTION TO HOLD MATTER IN ABEYANCE

Petitioner, Ocean Properties, Ltd. (Ocean) , Respondent, Florida Public Service Commission (Commission) and Intervenor, Florida Power & Light Company (FPL), pursuant to Section 120.56(1)(c), Florida Statutes, jointly move that the Administrative Law Judge enter an order canceling the hearing currently scheduled for July 14, 2004 and holding this matter in abeyance until after a final order has been issued by the Commission in Docket No. 030623-EI. As grounds therefor, the Joint Movants state:

1. Ocean's rule challenge petition seeks a determination regarding the validity of Rule 25-6.109(4), Florida Administrative Code, relating to the interest rate to be applied to utility refunds as that rule may apply in the context of overcharges due to meter error.

2. The issues of the amount of refunds, if any, owed by FPL to Ocean as a result of alleged overcharges due to meter error and of what interest rate applies to any such refunds are currently pending before the Commission in Docket No. 030623-EI.

3. In order to avoid the expense of potentially unnecessary administrative litigation, the Joint Movants request that this rule challenge proceeding be held in abeyance until a final order has been issued by the Commission in Docket No. 030623-EI. No later than 15 days after



the entry of the Commission's final order in Docket No. 030623-EI, Ocean will either (a) advise the Administrative Law Judge that this case should be removed from abeyance and that a new hearing date should be established, or (b) voluntarily dismiss its petition.

4. In the event that Ocean chooses to proceed with this rule challenge following the issuance of a final order in Docket No. 030623-EI, and also files with the Commission a timely motion for reconsideration of that final order, the Commission will defer ruling on Ocean's motion for reconsideration until after the entry of a final order in this rule challenge proceeding and FPL will not object to such deferral. Without conceding its relevance or potential effect, FPL agrees that the Commission is entitled to consider the final order in the rule challenge case in resolving any such motion for reconsideration. The Commission staff agrees to address the potential effect of a final order in the rule challenge case in making its recommendation on the motion for reconsideration.

5. By joining in this motion, none of the parties waives any position or argument that is otherwise available to it in this proceeding, in Docket No. 030623-EI, or on appeal of the final order in either proceeding; provided, however, that if the Commission's final order applies the challenged rule to Ocean, and the challenged rule is subsequently invalidated in Case No. 04-2250RX, neither the Commission nor FPL will assert on appeal that Ocean is nevertheless bound by the invalidated rule based on the fact that the determination of invalidity came after the Commission's final order as opposed to having been issued in July, 2004.

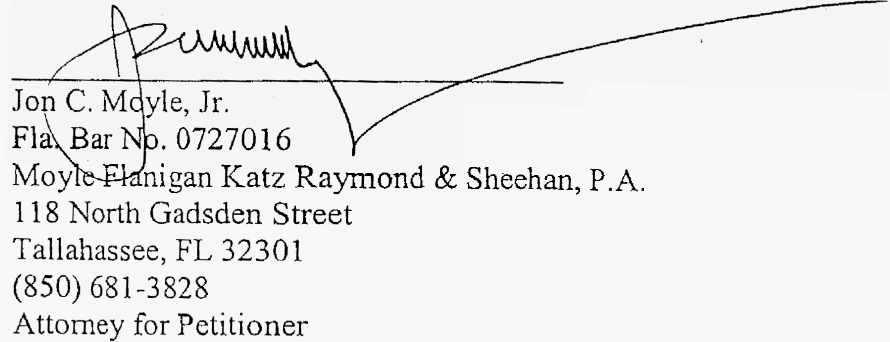
6. Ocean and the Commission have no objection to entry of an order granting FPL's Petition to Intervene in this proceeding.

WHEREFORE, the Joint Movants request that the Administrative Law Judge issue an order canceling the hearing currently scheduled for July 14, 2004 and holding this matter in

abeyance until after a final order has been issued by the Commission in Docket No. 030623-EI, as more fully set forth in the body of the motion.

RESPECTFULLY SUBMITTED this 8th day of July, 2004.

OCEAN PROPERTIES , LTD.



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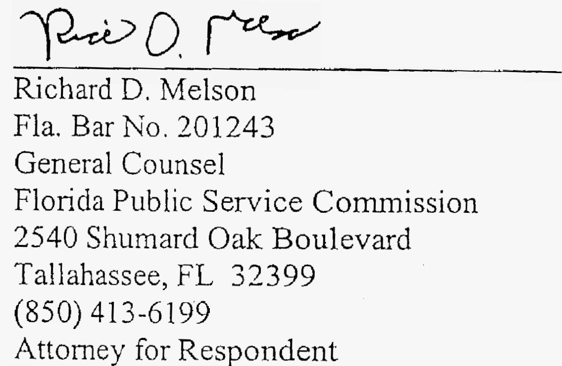

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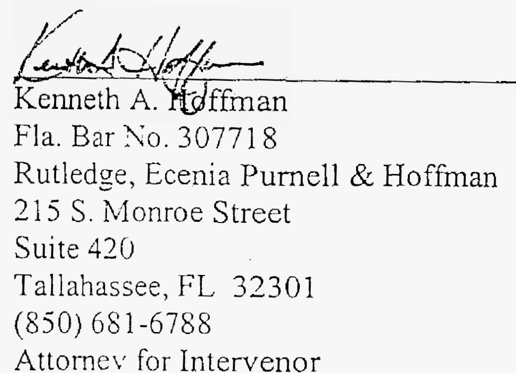

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Joint Motion to Hold Matter in Abeyance has been furnished by U.S. Mail this 8th day of July, 2004 to the following:

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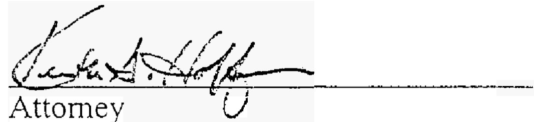

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